IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. HENRY HEINIG, Appellant.	No. 37466-8-II UNPUBLISHED OPINION

Penoyar, J. — Henry Heinig appeals his convictions of unlawful manufacture of methamphetamine,[1] unlawful possession of pseudoephedrine with intent to manufacture methamphetamine,[2] and unlawful possession of methamphetamine.[3] Through counsel, he argues that he was denied his right to a speedy trial. Pro se, he argues that the evidence used to convict him resulted from an unconstitutional search and seizure and that his sentence is unlawful as it exceeds the allowable statutory maximum. We affirm.

FACTS

On April 2, 2007, the Puyallup police received an anonymous tip that a strong odor of anhydrous ammonia was coming from unit A-102 of the Emerald Court Condominiums on 7th Street Southwest. Officer William Earick and Sergeant Scott Engle approached the unit on foot, shortly before midnight, intending to knock on the front door and talk to the occupants. When they approached the front door, they noticed that a surveillance camera was positioned to watch

[1] A violation of RCW 69.50.401(1)(2)(b).

[2] A violation of RCW 69.50.440(1).

[3] A violation of RCW 69.50.4013.

the front door. They quickly walked away, out of view, and to the side of the building complex.

Earick walked to the back corner of the building to see if anyone was fleeing out the back and, while there, heard sounds coming from a back patio consistent with someone mixing chemicals. After Engle confirmed Earick's suspicions and backup officers arrived, he and Earick walked through a grassy unfenced area behind the condos and past at least one other unit before getting to the source of the noise, Heinig's patio.

There Earick identified Engle and himself and asked Heinig to move away from the chemicals that were present on the back porch. They saw a metal container with a stirring stick, a container of xylene, a glass Mason jar, and coffee filters, all of which are commonly used in the methamphetamine manufacturing process.

After Earick told Heinig to put his hands behind his back, Heinig fled and the officers pursued. Engle shot Heinig with a taser as Heinig began scaling a cyclone fence. He quickly became cooperative and they placed him under arrest, read *Miranda*[4] warnings to him, and, after he acknowledged those rights and agreed to talk, Heinig explained that he was cooking methamphetamine. Heinig also explained that he had finished the extraction process but was not yet to the "salting out" process as he "[was] still cooking." Report of Proceedings (RP) (Jan. 3, 2008) at 56.

Lieutenant Dalan Brokaw, the methamphetamine laboratory team supervisor, arrived shortly after midnight. He assessed the situation, noting the chemicals on the back porch and the need to ventilate the condo unit. While doing this, he observed, through the open back door,

[4] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

containers of what appeared to be bi-layered liquid, suggesting a pseudoephedrine extraction process. He then spoke with Heinig, who, at that time, was handcuffed and in or near the jail van. Heinig explained that a man and woman were still in the residence and that there was a container of anhydrous ammonia in the front bedroom closet.

Detective Clark obtained a search warrant, and Brokaw and several other officers searched the unit. They seized methamphetamine manufacturing chemicals, containers, lithium batteries, jars of bi-layered liquid, pseudoephedrine tablets, and baggies of methamphetamine.

The State charged Heinig with unlawful manufacturing of methamphetamine, unlawful possession of pseudoephedrine and/or ephedrine with intent to manufacture methamphetamine, and unlawful possession of methamphetamine. In separate pretrial hearings, the court denied Heinig's CrR 3.5 and CrR 3.6 motions. The matter then proceeded to a bench trial after which the court found Heinig guilty of all three charged offenses. The court sentenced Heinig to 120 months of incarceration plus 9 to 12 months of community custody.[5]

ANALYSIS

I. CrR 3.3 Time for Trial

Heinig claims that the State violated his right to a speedy trial and thus his convictions should be vacated and dismissed with prejudice. Heinig cannot, however, raise this claim on appeal because he waived any challenge to his trial date by not making a timely objection. *See*

[5] The court imposed 120 month concurrent sentences for the two manufacturing counts and a 24-month concurrent sentence for the possession count.

CrR 3.3(d)(3)-(4).[6] The record before us does not show if he objected and, thus, his claim necessarily fails. In any case, our review of the record shows that Heinig's trial was within the time-for-trial period.

II. Statement of Additional Grounds

A. Suppression of the Evidence.

Heinig claims that officers Engel and Earick did not act as reasonable responsible citizens in investigating his residence. He explains:

> So the officers (1) failed to make contact by using the normal, most direct route to the house (2) came with lights off and parked well away from my condo (3) created an [sic] vantage point by using my fence for cover (4) tryed [sic] to spie [sic] through same fence to see what was going on. These are all things a "reasonably respectful citizen" would not do.

Statement of Additional Grounds at 11.

The trial court denied Heinig's motion to suppress following an evidentiary hearing. It explained:

> I'm going to deny the motion to suppress in this case. I'm just going to make a couple of comments about it, and I would ask the State to prepare formal

[6] These rules provide:

> (3) *Objection to Trial Setting.* A party who objects to the date set upon the ground that it is not within the time limits prescribed by this rule must, within 10 days after the notice is mailed or otherwise given, move that the court set a trial within those time limits. Such motion shall be promptly noted for hearing by the moving party in accordance with local procedures. A party who fails, for any reason, to make such a motion shall lose the right to object that a trial commenced on such a date is not within the time limits prescribed by this rule.
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> (4) *Loss of Right to Object.* If a trial date is set outside the time allowed by this rule, but the defendant lost the right to object to that date pursuant to subsection (d)(3), that date shall be treated as the last allowable date for trial, subject to section (g). A later trial date shall be timely only if the commencement date is reset pursuant to subsection (c)(2) or there is a subsequent excluded period pursuant to section (e) and subsection (b)(5).

findings of fact and conclusions of law.

First, Mr. Heinig was in open view when he was allegedly engaged in the manufacture of methamphetamine and, in fact, the officer testified that xylene was in open view, that a thermos or a metal container with a stirrer in it was in open view, and those things were observed by the officers while the officers were on a neighbor's property.

The exhibits make it clear that Mr. Heinig's and Mr. Forgan's back patio was in plain view of other neighbors and the neighbor's property where the officers were standing, as well as other neighbors upstairs, and, while it's disputed, what could be seen directly from another complex, since Mr. Heinig claims that he had a bamboo curtain between his porch that would cover or conceal his porch to some extent from the adjoining apartment complex, there was no testimony that there was anything that would obstruct the view from his neighbor's property onto his porch. And so given that, I don't believe that Mr. Heinig had a reasonable expectation of privacy in this particular case, notwithstanding the hour.

Second, the Court finds that the officers in this case did have probable cause and the warrant issued in this case was supported by probable cause. First, the officers arrived at the apartment complex because of the tip advising of the smell of anhydrous ammonia. The officers testified, from their training, that anhydrous ammonia is typically used in the manufacture of methamphetamine.

Second, when the officers arrived at the scene, they confronted a surveillance camera at the front door of A-102. The testimony is that, for reasons of officer safety, they decide not to knock and announce and not to remain in front of the camera. The officers testified that they called for backup, moved to a location which, admittedly, is a common area on the side yard of the condominiums so as not to be in the view of the surveillance camera located at the front of A-102. The officer also gave testimony, I believe, about the officers' concerns about the surveillance camera.

Three, when the officers went to a location that they felt was a safe location based on concerns about officer safety, it's then that they heard the sounds of stirring, of liquid being poured, of the indentation of a metal can being squeezed and then the pressure being released from that can. Based on their experience and that evidence, they investigated further. And the testimony is that they were standing, I believe, in the yard of the condominium next door to Mr. Heinig and Mr. Forgan when they actually saw xylene in plain view, a mason jar, a thermos and the stirrer, all of which the officers, in their experience, knew were essential ingredients and equipment used in the manufacture of methamphetamine, and that's when they saw Mr. Heinig on the porch with those materials, in fact, heard one of the jars being put down on the porch, which is a concrete porch, and at that time they attempted to contact Mr. Heinig and he fled.

Those four circumstances, combined with the fact that Mr. Heinig fled, all provide probable cause for seeking a warrant in this particular case. There was also testimony from Officer Brokaw that Mr. Heinig informed him that there were

> other people in the house and informed him that there were other materials in the house required for manufacture of methamphetamine, including an anhydrous tank in the front bedroom, I believe.
>
> The defense hasn't argued about Lieutenant Brokaw's conduct. There's no indication that Lieutenant Brokaw engaged in unreasonable search in this case. The lieutenant testified that the door was open when he went back to the apartment to make sure that it was safe, that there was no chemical hazard that would affect either the occupants of the condominium unit A-102 or any of the other residents in the neighborhood and to make sure that there wasn't a need to evacuate.
>
> This testimony, which is unrefuted, is that the door was open, he could see on the counter a liquid which was half clear and half cloudy, that through his experience of many years being involved in the meth lab team, he knew that to be an extraction process for pseudoephedrine. Nonetheless, he did not enter the house directly. He correctly waited and sought a warrant based on the information that he was provided by Officer Earick and Officer Engel and Mr. Heinig himself, and from his observation from plain view from outside.
>
> Also, I would just note for the record that Officer Brokaw was very careful to mention that he did not step onto the porch when he observed those materials on the kitchen table, which, again, were in plain view from the door, which was already open.
>
> His other conduct, breaking the windows, trying to open airways for cross ventilation, the defense hasn't contested that conduct, and the Court doesn't find anything improper in that conduct. I believe that that was done for officer safety and for community safety given the danger associated with methamphetamine labs. And so for those reasons I'm going to deny the motion to suppress.

RP (Dec. 13, 2007) at 152-56.

Division Three of this court recently explained the law pertinent to police activity similar to that here:

> Although residents maintain an expectation of privacy in the curtilage, or area contiguous with a home, "police with legitimate business may enter areas of the curtilage which are impliedly open, such as access routes to the house." *State v. Seagull,* 95 Wn.2d 898, 902, 632 P.2d 44 (1981) (footnote omitted). In so doing, however, an officer must conduct themselves as would a "reasonably respectful citizen." *Id.* (citing *United States v. Vilhotti,* 323 F. Supp. 425 (S.D.N.Y.), *aff'd in part and rev'd in part,* 452 F.2d 1186 (2d Cir. 1971), *cert. denied,* 406 U.S. 947 (1972)). Under the open view doctrine, when an officer is lawfully present in an area, his detection of items by using one or more of his senses does not constitute a search within the meaning of the Fourth Amendment.

Id. at 901.

> Whether a portion of the curtilage is impliedly open to the public depends on the totality of the circumstances surrounding the deputies' entry. *Id.* at 902-03. An access route is impliedly open to the public, absent a clear indication that the owner does not expect uninvited visitors. *See State v. Ross,* 141 Wn.2d 304, 312, 4 P.3d 130 (2000); *see also State v. Hornback,* 73 Wn. App. 738, 743, 871 P.2d 1075 (1994). "No Trespassing" signs alone do not create a legitimate expectation of privacy, especially without additional indicators of privacy expectations such as high fences, closed gates, security devices, or dogs. *See State v. Chaussee,* 72 Wn. App. 704, 710, 866 P.2d 643, *review denied,* 124 Wn.2d 1008, (1994). Entry during daylight hours is more consistent with that of a reasonably respectful citizen. *See Ross,* 141 Wn.2d at 314.

State v. Jesson, 142 Wn. App. 852, 858-59, 177 P.3d 139 (2008).

Generally, we review a trial court's findings of fact following a suppression hearing to determine if the record supports those findings. In turn, we decide if those findings support the trial court's conclusions of law. *State v. Ross,* 106 Wn. App. 876, 880, 26 P.3d 298 (2001). Here, however, the record does not show if the State prepared findings as the court requested or whether the court approved and entered them. As such, we have only the trial court's oral decision to discern its reasons for denying the motion to suppress. *See State v. Radka,* 120 Wn. App. 43, 48, 83 P.3d 1038 (2004) (court may overlook the absence of findings and conclusions if the trial court gave a clear, comprehensive oral ruling that left no doubt as to the basis for its decision).

In ruling on Heinig's motion to suppress, the trial court found that the officers saw chemicals and activity on the back porch from the neighbor's property and that the back porch was open to public view from differing angles. As such, Heinig had little or no expectation of privacy while making methamphetamine on his back porch. These officers were familiar with the

methamphetamine manufacturing process and observed chemicals, materials, and activity consistent with that process before they even stepped on Heinig's property (assuming this back area was his as he asserted). In our view, the officers acted surreptitiously in order to preserve any potential evidence and prevent anyone from fleeing before they could investigate. Once they approached Heinig and he tried to flee, they had probable cause to arrest and to obtain a search warrant. All additional evidence gathered after that arrest was properly admitted at trial.

B. Sentencing.

Heinig claims that his sentence of 120 months' incarceration plus 12 months of community custody exceeds the statutory maximum and thus is invalid. While 120 months was the maximum standard range for his offense, the maximum sentence he could receive was 240 months. *See* CP 39 and RCW 69.50.408 (subsequent drug offense doubles statutory maximum); *In re Pers. Restraint of Cruz,* 157 Wn.2d 83, 90, 134 P.3d 1166 (2006) (statute doubles maximum not standard range).

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Penoyar, J.

We concur:

Van Deren, C.J.

Quinn-Brintnall, J.